STATEMENT OF ERIC DANOFF REGARDING
PROPOSED LEGISLATION TO MODIFY
THE DEATH ON THE HIGH SEAS ACT,
SUBMITTED FOR THE HEARING ON APRIL 21, 1998
BEFORE THE SUBCOMMITTEE ON SURFACE TRANSPORTATION AND
MERCHANT MARINE OF THE
SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

Mr. Chairman, Members of the Subcommittee, my name is Eric Danoff. I am an attorney with the law firm Kaye, Rose & Partners, which has offices in California and Florida. I have practiced maritime law for over 23 years, and have handled a number of cases involving death on the high seas. My work for the maritime industry primarily has focused on representing shipowners, ship operators, and their insurers. Therefore I am familiar with their views concerning the delicate balance needed for a fair remedy for death at sea. This Statement addresses proposals to amend the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. §761 – 767. Proposed amendments to date include H.R. 2005 and S.943.

DOHSA provides for the recovery of pecuniary loss, in its broadest sense, for deaths at sea. This is a well-chosen remedy for maritime cases. To add non-pecuniary damages to DOHSA in the maritime context would be undesirable. To do so would make DOHSA by far the world's most liberal remedy scheme for death on the high seas. Not only would the U.S. be out of step with the rest of the world's maritime nations, but since DOHSA remedies are not limited to U.S. citizens, the U.S. would become the "courthouse for the world" for cases involving death at sea since claimants for non-U.S. decedents would have a powerful incentive to invoke our liberal jurisdiction. Also, the nebulous and subjective nature of non-pecuniary damages would make liability unpredictable and inconsistent, and thus would make cases harder to settle. Nor would such a change in DOHSA enhance safety aboard ships, since an expansion of liabilities under DOHSA would be an ineffective and unreliable tool for promoting safety on the high seas. In any event, Congressional action on this issue should await the decision of the Supreme Court in a pending case that may significantly impact the damages that are presently available under DOHSA in both the aviation and maritime contexts.

I. Summary of Current DOHSA Provisions.

A. Applicability of DOHSA.

DOHSA was enacted in 1920 to create a uniform cause of action for the death of persons caused by events at sea. The wrongful death laws of most states did not apply to torts arising outside the states' boundaries, and

therefore a uniform federal remedy was needed. DOHSA allows recovery for any death caused by "wrongful act, neglect or default occurring on the high seas." Liability under DOHSA may be based upon a variety of legal theories, including negligence, unseaworthiness (if the decedent was a seaman), intentional conduct, or product liability.

The courts apply DOHSA broadly, to any death resulting from a maritime tort occurring anywhere in the world more than a marine league (three nautical miles) from a U.S. shore (regardless where the death ultimately occurs). DOHSA applies to all persons, including seamen, passengers, offshore workers, and shipboard visitors. To recover under DOHSA, neither the decedent nor the claimants need be U.S. citizens or residents.

The Jones Act, 46 U.S.C. App. §688, enacted in 1920 shortly after DOHSA, also provides a remedy for the death of seamen. Representatives of deceased seamen can sue under the Jones Act, DOHSA, or both.

Any person or entity causing a death at sea can be held liable under DOHSA. Also, any vessel on which a tort arises is liable in rem and can be arrested and seized to secure or satisfy a DOHSA claim or judgment. Defendants may include U.S. or non-U.S. shipowners and operators, whether the vessel is U.S. flag or foreign flag. The U.S. Government can be sued under DOHSA.

DOHSA does not apply to deaths caused by acts occurring within three miles of a U.S. shore. Within that three mile limit a cause of action for wrongful death can be alleged under the Jones Act (for seamen), the Longshore & Harbor Workers Compensation Act, 33 U.S.C. §901 et seq. (for non-seamen maritime workers), the general maritime law (for all persons), and state law.

B. Who Can Recover Under DOHSA.

Section 761 of DOHSA provides that damages may be recovered by the decedent's wife, husband, parent, child, or any dependent relative. This delimitation of the class of persons entitled to recover death damages is not unusual. Virtually every state and federal wrongful death statute in some way limits the class of potential claimants.

C. Damages Recoverable Under DOHSA.

Section 762 of DOHSA provides for the recovery of the "pecuniary loss" sustained by the decedent's beneficiaries. Pecuniary losses recoverable within the meaning of DOHSA §762 include:

1. Loss of support, which includes the financial contributions that the decedent would have made to the claimant had the decedent lived, usually measured by loss of the decedent's future income;

2. Loss of services, which means the monetary value of services (for instance, household services) that the decedent would have provided to the claimant, usually measured by the cost of paying someone to perform such tasks;

3. Loss of nurture, care, guidance, and instruction, which is designed to compensate a decedent's minor children for the intellectual, moral, and physical training that a parent confers. Loss of nurture damages are recoverable by adult children or others upon a showing of special need or circumstances;

4. Loss of inheritance, which compensates a claimant for the value of property that the decedent probably would have accumulated and which the claimant would have inherited;

5. Medical expenses for treatment of the decedent; and

6. Funeral expenses.

D. Damages Not Recoverable Under DOHSA.

DOHSA prohibits the recovery of non-pecuniary (i.e., non-economic) damages, including punitive damages, survivors' grief, and loss of society or consortium. DOHSA does not expressly provide " survival" damages, which are damages allegedly sustained by the decedent during the time he or she survived after a tort but prior to death. Such damages can include, for example, pre-death pain and suffering of the decedent. The federal appellate courts are split on whether the general maritime law supplements DOHSA to provide survival remedies such as the decedent's pre-death pain and suffering. (This issue is presently before the U.S. Supreme Court, discussed below.)

E. Jury Trials Under DOHSA.

A suit under DOHSA may be filed in either state court or federal court. Suit must be filed in federal court if the state's wrongful death statute does not apply to deaths at sea. An action in federal court that is filed solely under DOHSA is in admiralty, and therefore the plaintiff has no right to a jury trial. If a DOHSA claim is filed in state court, is brought in federal court but coupled with non-admiralty claims, or is brought in federal court under diversity jurisdiction, the entire case (including the DOHSA claim) may be tried to a jury.

II. Comments on Potential Revisions to DOHSA.

A. Amendments to DOHSA Should Await Decision Of A Pending U.S. Supreme Court Case That May Significantly Affect the Remedies Available For Death On the High Seas.

The U.S. Supreme Court is presently deciding the case Dooley v. Korean Air Lines, Supreme Court No. 97-704, reviewing 117 F.3d 1477 (D.C. Cir. 1997). That case involves the issue whether the general maritime law provides a cause of action for survival damages, in particular pre-death pain and suffering, as a supplement to DOHSA. The lower federal courts have split on this issue. Briefing to the Supreme Court has been completed. Oral argument of the case is set for April 27, 1998, and a decision can be expected within a few months. The decision may significantly affect the remedies available for death on the high seas, and it almost certainly will clarify what remedies are available. It makes little sense for Congress to act on possible amendments to DOHSA before the Supreme Court decides the case, for whatever is proposed now may need to be modified following the Court's decision, or may address a problem that will no longer exist.

B. Recovery of Pecuniary Damages Is an Appropriate Remedy for Deaths At Sea, and Amending DOHSA to Allow Non-Pecuniary Damages Would Result in Undesirable Consequences.

DOHSA allows recovery of all pecuniary damages arising from death, and the scope of such damages is broad. For instance, if the parent of a child dies, the child is entitled to recover not only the loss of support, but also a monetary award for loss of nurture, care, guidance, and instruction, which may be a significant amount.

To amend DOHSA to allow non-pecuniary death and survival damages, such as punitive damages and survivors' grief, would open a Pandora's box of undesirable consequences. These types of damages are nebulous and subjective. Because they are unpredictable in amount, they are difficult to plan for or insure. Indeed, punitive damages are in some states uninsurable. The unpredictability of such damages may make settlement of such claims difficult or impossible. In recognition of these problems, not only DOHSA but also other federal laws provide that pecuniary damages are the proper measure of recovery for death. For example, non-pecuniary damages for loss of society or survivors' grief are not recoverable under either the Federal Employer's Liability Act ("FELA"), 45 U.S.C. App. §§ 51-59, or the Jones Act, 45 U.S.C. App. § 688, which incorporates FELA.

Punitive damages are particularly controversial. They are not intended to compensate injured persons, but are a form of punishment or retribution. The case against punitive damages has been made elsewhere. Suffice it to say for present purposes, many believe that punitive damages are random, excessive, non-compensatory to the recipient, and of no significant benefit in preventing casualties.

Pain, suffering, and grief damages have similar drawbacks. Juries are given little or no useful guidance as to what amounts are appropriate, resulting in widely varying and sometimes excessive awards, depending upon the emotional impact of the casualty. For example, some lower courts allowed juries to award pre-death pain and suffering damages to the estates of the deceased passengers on the KAL 007 flight that was shot down over Russia. (The Warsaw Convention limit did not apply because willful misconduct was found.) The elapsed time between the impact of the missile on the airplane and the time the airplane hit the water was about 12 minutes. One jury awarded $1,500,000 in pre-death pain and suffering damages for the death of a husband and wife. Another jury awarded $100,000 in pain and suffering damages for the death of another passenger on the same flight. This disparity in damages illustrates both the random nature and potential excessiveness of pain and suffering awards.

While pre-death pain and suffering damages may be compensatory to someone who experiences them, they are not compensatory to relatives of that decedent. Indeed, a number of states do not allow pre-death pain and suffering under their own laws. These states include Arizona, California, Colorado, Idaho, Indiana, Minnesota, Virginia, and Wyoming. Nor do most states allow the recovery of damages for survivors' grief. Some states place monetary caps on non-pecuniary wrongful death awards.

To amend DOHSA to include non-pecuniary damages by supplementing DOHSA with state law would create other problems. State laws vary as to what non-pecuniary wrongful death or survival damages are recoverable, and in what amounts. Therefore two similar deaths at sea may yield substantially different recoveries depending upon the state in which each action is filed. The inevitable result would be forum shopping for the state with the most liberal damages law or most generous juries. Since no particular state's law is likely to be obviously most appropriate to a death on the high seas, a shipowner defendant would have no way of knowing what liabilities to which it is subject, and may be subject to conflicting liabilities when multiple deaths arise out of the same casualty.

When DOHSA was enacted, it was expected to cover maritime deaths on the high seas. Trans-oceanic air flights were not contemplated. The impetus for amending DOHSA primarily has arisen from large aviation disasters involving the deaths of hundreds of U.S. citizens – KAL Flight 007 in 1983, Pan Am Flight 103/Lockerbie, and TWA Flight 800. No similar maritime casualties involving U.S. vessels or citizens have occurred, and no U.S. group affected by the maritime industry or potential maritime casualties has called for changes in DOHSA.

C. Deaths on the High Seas Involve International, Not Purely Domestic,

Considerations.

If DOHSA is amended to allow non-pecuniary damages, the U.S. would have the world's most liberal remedies for death on the high seas. Inevitably, the U.S. would become the "courthouse for the world" since claimants for non-U.S. decedents would have a powerful incentive to invoke our liberal jurisdiction and file lawsuits here for any death that has even the slightest U.S. contact. DOHSA applies to many cases that do not involve U.S. citizens or U.S. vessels. The scope of U.S. law and access to U.S. courts are broadly applied to foreign citizens and vessels. Since some states have laws that attempt to prohibit or limit dismissal of such cases for forum non conveniens (inconvenient forum), our courts may be forced to retain jurisdiction over cases with little U.S. connection. Our already overburdened court system could be subject to a large influx of wrongful death cases with minimal U.S. connections.

Deaths on the high seas often have international ramifications, so recognition of the legal and social norms of the international community is appropriate. By and large, DOHSA accomplishes that, whereas a proposed liberalization of remedies may not. For instance, other nations generally do not allow jury trials in civil tort cases, nor punitive damages, nor unlimited damages for non-pecuniary losses. The most widely accepted international treaty governing death on the high seas is the Athens Convention Relating to the Carriage of Passengers and Their Luggage By Sea. Although the U.S. is not a signatory, such major maritime nations as the United Kingdom, Germany, Greece, Spain, Russia, and Argentina are. The Athens Convention contains a limit on damages for the death of a passenger on the high seas. DOHSA as presently constituted more closely parallels international standards of legal redress than would more extensive and unlimited non-pecuniary remedies.

D. Ship Safety Should Be The Responsibility of Safety Professionals.

Seagoing vessels are currently required to meet detailed and comprehensive U.S. Coast Guard and International Maritime Organization (IMO) safety standards. Flag states, port states, and international ship classification societies closely monitor compliance with these safety regulations. The U.S. Coast Guard vigilantly enforces safety rules and regulations for all U.S. flag vessels and for all non-U.S. flag vessels that call at U.S. ports. For safety professionals like the Coast Guard to issue, implement, and enforce safety rules for ships is the best way to prevent accidents at sea. The tort system is an ineffective and unreliable tool for promoting safety aboard ships.

E. DOHSA Should Retain Its Status As An Admiralty Action, To Be Tried To The Court Instead Of A Jury.

Since the founding of the United States, actions in admiralty have been tried to a judge, not to a jury. Unlike other casualties, deaths at sea rarely involve " local interests" affecting a local community. Further, maritime

casualties tend to be complex and outside the understanding or experience of an average citizen juror. Such cases are more appropriately tried to a judge than to a jury. To subject DOHSA to state law remedies and juries would overturn this longstanding principle.

F. If Amended, DOHSA Should Be Part Of An Overall Tort Reform Bill.

There is widespread belief that many aspects of the present tort system in the U.S., including excessive litigation involving foreign litigants, are in need of reform. Other issues under scrutiny generally by Congress include the availability of punitive damages, the frequently unpredictable and excessive awards by juries, and the amorphous standards for pain and suffering. It would make little sense to amend DOHSA without considering overall tort reform so that a comprehensive balance can be struck. Otherwise DOHSA cases may become subject to the same problems and abuses that many in Congress are trying to remedy in other legal areas.

III. Conclusion.

DOHSA as presently constituted more closely parallels international standards of legal redress than would a damages scheme that included unlimited non-pecuniary damages. Other nations generally do not allow unlimited damages, nor punitive damages, nor jury trials in civil tort cases. In the maritime context, adding non-pecuniary damages to DOHSA would be undesirable.

Thank you for the opportunity to present these views.

Respectfully submitted,
Eric Danoff
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